Supreme Court, U.S.
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No. _____ 08-403

In The

Supreme Court of the United States

ROY F. BRUNO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In determining whether property is subject to civil forfeiture, can the court properly consider the character of illegally seized property, that it is currency, when that fact is known only as a result of the illegal seizure.

In short, what is the scope of the application of the Fourth Amendment's exclusionary rule to civil forfeiture proceedings?

PARTIES TO THE PROCEEDING

Petitioner is Roy F. Bruno, claimant-appellant below. $493,850.00 claimed by Mr. Bruno is the named defendant *in rem*. Claimant-appellant Miguel Camacho and the Ford Truck are not parties to this petition.

Respondent is the United States of America, plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Roy F. Bruno respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The court of appeals decision is reported at 518 F.3d 1159 and is reprinted in the Appendix to the Petition ("App.") at 1. The district court decision is unreported and is reprinted at App. 23.

JURISDICTION

The court of appeals denied a petition for rehearing on July 3, 2008. App. 44. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing

the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Petitioner was a passenger in a pickup truck stopped by a highway patrol officer while driving along a rural Arizona freeway. App. 2. The officer, without consent and without reasonable suspicion, searched the truck and discovered a large amount of United States currency. The government filed a civil forfeiture complaint and the petitioner filed a timely claim. App. 3.

After an evidentiary hearing the district court held that the initial traffic stop had been justified but that the ensuing search exceeded the limited scope of the stop. The district court granted the motion to suppress. App. 3.

The parties then exchanged motions for summary judgment. The government presented information ("the Miami information") that the driver of the truck was associated with an ongoing narcotics investigation. Petitioner argued, unsuccessfully, that the Miami information was derivative of the illegal seizure. The district court granted summary judgment in favor of the government and ordered forfeiture of the money. App. 4.

The Petitioner also argued to the district court that the order of suppression precluded the court

from considering the character of the illegally seized property in its determination of forfeiture. Petitioner argued that due to the suppression order the court had to view the forfeiture *res*, the currency, as nothing more than a "featureless widget." To do otherwise would amount to government exploitation of the illegal search which was the sole source of the discovery of the money. App. 8.

In response, the district court held:

> However, the Court does not believe that exclusion of the cash means that Court must consider the defendant currency as a "widget." The Court believes it can still take notice of the fact that the defendant is cash. This is obviously stated in the caption of the case. Perhaps the denominations of making up the amount and the actual money itself cannot be put into evidence. However, *there is no way for the Government to show a "widget" is the product of a drug transaction and, therefore, the Court does not believe that it has to disregard the fact that one of the defendants is cash.* App. 34 (emphasis added).

The Ninth Circuit agreed. It noted that illegally seized property "may not be *introduced* as evidence in a forfeiture proceeding. [*United States v.*] *$191,910*, 16 F.3d [1051] at 1063 [9th Cir. 1994] (emphasis in original)." App. 11. But mere consideration of the character of the seized property presents a different issue.

> *$191,910* makes clear we that we cannot consider the amount of currency that the government illegally seized. *Id.* at 1059, 1065. The issue presented here is whether it necessarily follows that we are prohibited from considering the fact that the illegally seized property is, in fact, currency. This is an issue of first impression in this Circuit. App. 9-10.

The Ninth Circuit rejected any requirement that *$191,910.00*, the leading circuit case on the application of the exclusionary rule to civil forfeiture proceedings, mandated treatment of illegally seized *res* as nothing more than a "featureless widget."

> Claimants read *$191,910* too broadly to exclude more than it does. We have consistently held that "'[t]he mere fact of the illegal seizure, standing alone, does not immunize goods from forfeiture.'" *United States v. One 1977 Mercedes Benz*, 708 F.2d 444, 450 (9th Cir. 1983). An interpretation of *$191,910* requiring us to ignore the character of the illegally seized property as currency, or requiring us to consider the illegally seized property as a "featureless widget," would contradict this longstanding principle by immunizing illegally seized currency from forfeiture. As noted by the magistrate judge, there would be "no way for the government to show that a 'widget' is the product of a drug transaction." The government could never place a "widget" in context or connect

it with anything, let alone a drug transaction. App. 10-11.

The Ninth Circuit held that "when illegally seized *res* in a civil forfeiture proceeding consists of currency, courts may consider the fact that the illegally seized *res* is currency." App. 11. The Ninth Circuit, somehow, differentiated consideration of the *res* as currency from introduction of that fact as evidence. "While courts may not introduce illegally seized currency into evidence or consider its amount, courts may recognize that illegally seized property consists of currency, if that is the case." App. 11.

Finally, not only did the Ninth Circuit recognize this issue as one of first impression in its own circuit but also recognized a split among the circuits "as to whether and to what extent illegally seized property must be suppressed" in a forfeiture case. App. 10.

REASONS FOR GRANTING THE PETITION

The issue presented involves the scope of the application of the exclusionary rule to civil forfeiture proceedings. The Ninth Circuit's allowance of illegally obtained information to support forfeiture conflicts with Court precedent. Additionally, the split among the circuits as to the application of this important constitutional principle merits this Court's review. Resolution of this issue affects not just the federal forfeiture law but similar, and widely used, statutory schemes in every state and many municipalities.

Over 40 years ago, in *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965), this Court definitively held that the Fourth Amendment's exclusionary rule applied to civil forfeiture proceedings. The forfeiture proceeding in *One 1958 Plymouth Sedan*, as is generally true with most forfeitures, was categorized as "quasi-criminal" in that it sought to impose a penalty based on a violation of criminal law. 380 U.S. at 701.

The seemingly obvious clarity of the application of the exclusionary rule to forfeitures was undermined to a degree years later by *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984). In that case, this Court held that the "'body' or identity of a defendant or respondent in a criminal or a civil case is never itself suppressible as a fruit of an unlawful arrest," search or seizure. 468 U.S. at 1039. The Court specifically indicated that a similar rule applies to forfeiture proceedings. *Id.*

The concept set forth in *INS v. Lopez-Mendoza*, that the thing illegally seized is itself not suppressible, has become interpreted to mean that an illegal search does not "immunize" the *res* from forfeiture. This concept, that the *res* itself is not suppressible, has lead to confusion regarding the application of the exclusionary rule in forfeiture cases and to disparate treatment of this issue by the various circuits.

A. Circuit Split

The Ninth Circuit, in *United States v. $191,910.00 U.S. Currency,* 16 F.3d 1051, 1065 (9th Cir. 1994), directly held that *INS v. Lopez-Mendoza* did not contradict suppression of illegally seized *res* as *evidence* in a forfeiture case. "On careful examination, *Lopez-Mendoza*, merely reaffirms the longstanding rule that a court does not lose jurisdiction over an individual merely because the government secured his presence in the forum through illegal means." 16 F.3d at 1064.

The Ninth Circuit Opinion at issue, however, ignores both the rule and the rationale set forth in *$191,910.00* and finds a distinction between the use of illegally obtained information as *evidence* and its use to inform the court that the *res* consists of currency. App. 11. The Ninth Circuit noted that this distinction, a case of first impression for it, "was [also] consistent with the views of the First and D.C. Circuits." App. 10.

That First Circuit case, *United States v. $36,634*, 103 F.3d 1048, 1052, n.3 (1st Cir. 1997), noted that illegally seized currency would not be immune from forfeiture but that evidence from the money, such as the amount or the fact of a dog alert on it, could be suppressed if unconstitutional. The case provides no analysis on the issue.

The D.C. Circuit case, *United States v. $639,585*, 955 F.2d 712, 715 n.5 (D.C. Cir. 1992), involved a luggage search at a train station. The illegally seized

currency was later the subject of a positive dog alert. After suppressing the evidence, the district court dismissed the forfeiture since the government could not meet its burden of proof without the disallowed cash, keys, and ledgers. Despite that result, the D.C. Circuit noted that "the property itself cannot be excluded from the forfeiture action." 955 F.2d at 715, n.5, *citing United States v. $37,780.00*, 920 F.2d 159, 163 (2nd Cir. 1990). The D.C. Circuit added that illegally seized property is no more immunized from forfeiture than is an illegally arrested defendant immunized from prosecution. *Id.*

These cases, along with the Ninth Circuit Opinion at issue, suggest that there is some "limited" form of admissibility applicable to suppressed evidence in a civil forfeiture context. The rationale seems to be that since suppression does not "immunize" the *res*, then it necessarily follows that something has to, or at least can, be considered in order to support a forfeiture.

The Eighth Circuit has taken firm steps in both directions. One case holds that suppression never applies in a forfeiture context and the other holds that it does. Although it was unnoted by the Opinion at issue, the Eighth Circuit, in *United States v. $12,390.00*, 956 F.2d 801 (8th Cir. 1992), held that the "forfeitable items *would not be inadmissible* even if they had been seized in violation of the Fourth Amendment." (Emphasis added.) Such a holding seems to fully contradict *One 1958 Plymouth Sedan*.

On the other hand, in another case, the Eighth Circuit has also held that the exclusionary rule does apply to forfeitures. *United States v. $7,850.00*, 7 F.3d 1355, 1357 (8th Cir. 1993).

The Fifth Circuit appears to be at the other end of the spectrum from those cases allowing some consideration of illegally seized property. The Fifth Circuit, in *United States v. Monkey*, 725 F.2d 1007, 1011 (5th Cir. 1984), discussed the impact of an illegal seizure of a fishing vessel and noted that if illegal, evidence of the marijuana debris would have to be suppressed. The court cited *United States v. One Mercedes Benz*, 711 F.2d 1297, 1303 (5th Cir. 1983) for the proposition that *One 1958 Plymouth Sedan* "holds that an object illegally seized cannot in any way be used either as evidence *or as the basis for jurisdiction*." (Emphasis added.) This holding, that illegally seized information cannot be used even for jurisdictional purposes contradicts the *INS v. Lopez-Mendoza* notion that the *res* itself is not suppressible.

The Tenth Circuit has suggested that an illegal search may indeed jeopardize the government's ability to obtain forfeiture. But how that might occur is not clear from the opinion. In *United States v. $149,442.43*, 965 F.2d 868, 872 (10th Cir. 1992), the court stated that any "defects in the process used to secure the possession of the defendant property may defeat the government's right to possession, inasmuch as the government will be barred from introducing evidence illegally seized in violation of the fourth amendment to prove a claim of forfeiture."

An excellent analysis of the impact of the collision of *INS v. Lopez-Mendoza* and *One 1958 Plymouth Sedan*, is set forth by the Second Circuit in *United States v. $557,933.89*, 287 F.3d 66, 80 (2nd Cir. 2002).

> The Supreme Court has held that the Fourth Amendment exclusionary rule applies in civil forfeiture cases. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965). This circuit's exposition of that holding remains, however, somewhat unclear. In *United States v. $37,780.00*, 920 F.2d 159, 163 (2nd Cir. 1990), we stated that "an illegal seizure of property does not immunize that property from forfeiture, that *the property itself cannot be excluded from the forfeiture action,* and that evidence obtained independent of the illegal seizure may be used in the forfeiture action." *Id.* at 163 (emphasis added). The meaning of the italicized portion of this statement is somewhat unclear. Other courts of appeals have understood it to mean that the defendant property must also be admitted *for its evidentiary value* in forfeiture proceedings regardless of the propriety of its initial seizure – and so interpreted, these courts and commentators have been critical of that principle. *See United States v. $191,910.00 U.S. Currency,* 16 F.3d 1051, 1064 & n.27 (9th Cir. 1994) (disagreeing with *$37,780* and noting that the "majority" of other circuits do likewise; 1 Wayne R. LaFave, *Search and Seizure* §1.7(a) n.10 (3d ed. 1996) ("Despite some authority to the contrary [i.e., *$37,780.00*], it does not follow that the res

> in a forfeiture proceeding, if illegally seized, can also be admitted for its evidentiary value."

Nevertheless, *$577,933.89*, after noting the confusion and ambiguity, declined to "enter this rather murky area." 287 F.3d at 80.

So at a minimum, circuit treatment of this issue ranges from not suppressible at all (*United States v. $12,390.00*) to suppressible even to the degree of defeating jurisdiction. (*United States v. Monkey*). The Ninth Circuit Opinion at issue here, along with the First and D.C. circuits appear to allow consideration of illegal evidence for non-evidentiary purposes. The Tenth is implicitly ambiguous and Second is admittedly so.

Curiously, it is the Ninth Circuit case of *United States v. $191,910.00 U.S. Currency,* 16 F.3d 1051, 1065 (9th Cir. 1994) that analyzes, most thoroughly, the effect of *INS v. Lopez-Mendoza* on *One 1958 Plymouth Sedan*. As stated earlier, *$191,910.00* unambiguously concludes that "*Lopez-Mendoza* merely reaffirms the longstanding rule that a court does not lose jurisdiction over an individual merely because the government secured his presence in the forum through illegal means." 16 F.3d at 1064. As a result, *$191,910.00* undeniably holds that illegally seized property may not be "introduced as *evidence* in a forfeiture proceeding." 16 F.3d at 1063.

Yet this clarity of analysis is later undermined by the Ninth Circuit itself in the Opinion at issue here. The Opinion here holds that "when illegally seized *res*

in a civil forfeiture proceeding consists of currency, courts may consider the fact that the illegally seized *res* is currency." App. 11.

The holding can be reconciled with *One 1958 Plymouth Sedan* and the exclusionary rule only to the extent that consideration of illegally obtained information to identify the *res* as currency is not an *evidentiary* use of that information. That concept will be discussed in Section B below.

David B. Smith is a widely recognized authority on civil forfeiture and author of *Prosecution and Defense of Forfeiture Cases* (Matthew Bender 2007). He has made two observations about the statement in *INS v. Lopez-Mendoza* that "a similar rule applies in forfeiture proceedings." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984). First, the statement itself is *dictum*. §10.05[8] at 10-88, n.95. And second:

> However, the cases cited in support for the statement merely stand for the proposition that an illegal seizure of the res will not bar its forfeiture. None of the cited cases addresses the question whether a res taken into custody as a result of an illegal search or seizure may be suppressed as evidence. While the court held in *United States v. Crews* [445 U.S. 463 (1980)] that a defendant's physical appearance can never be a suppressible fruit of an illegal arrest, it does not necessarily follow that the res, which is technically the defendant in a civil forfeiture action, cannot be suppressed as evidence. The failure to exclude the res as evidence

> rewards the government for carrying out an illegal search or seizure. Oddly, the circuits are divided. §10.05[8] at 10-88.

B. Conflict with Court Precedent

Mr. Smith also notes that in the typical forfeiture case involving a car, the *res* has no independent evidentiary value. "However, there are some cases, notably under 21 U.S.C. §881(a)(6) [seized currency] in which the res is a cash horde, where this question could well be dispositive given the strong adverse inferences that flow from the unexplained possession of a large amount of cash" §10.05[8] at 10-89.

What Mr. Smith is saying when he states that suppression may be dispositive in those cases involving the illegal seizure of currency is that when a necessary element of forfeiture can be satisfied only by consideration of some form of the illegally seized information, then the government has both exploited and benefitted from its own illegal actions. Which, of course, is simply another way of saying that the exclusionary rule prohibits consideration of illegal information as evidence.

Here is how the holding in the Opinion at issue contradicts the exclusionary rule's prohibition against the use of illegally obtained information as evidence. The district court described the ultimate issue before it as follows:

> The Court's task is to determine whether the untainted evidence shows, by a preponderance of the evidence, that the defendant currency is subject to forfeiture because it represents money furnished or intended to be furnished by any person in exchange for a controlled substance. (21 U.S.C. §881(a)(1)) [sic][1] or it is subject to forfeiture as it was involved in a transaction or attempted transaction in violation of 18 U.S.C. §1956 or 1957.[2] App. 35.

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[1] Although the district court cited 21 U.S.C. §881(a)(1) it actually tracked the language of §881(a)(6), the provision applicable to "moneys, negotiable instruments, securities or other things of value." These provisions state, in pertinent part, as follows:

§881(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

. . .

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

[2] 18 U.S.C. §1956(a) prohibits, in relevant part, certain "financial transactions" involving specified unlawful activity.

(Continued on following page)

An essential element of proof required for forfeiture, under either theory, is that the subject property consists of some form of *monetary instrument,* in this case, currency. Yet the record is devoid of any evidence that the item illegally seized by the highway patrol officer consisted of currency other than the information the officer learned from that same illegal seizure.

Both the district court and the Ninth Circuit grasped this problem. Yet neither seemed to grasp that by considering the nature of the *res* as currency they were using illegally obtained evidence to satisfy an element of forfeiture which required "untainted evidence show[ing], by a preponderance of the evidence, that the defendant currency is subject to forfeiture." App. 35.

> As noted by the magistrate judge, there would be "no way for the government to show that a 'widget' is the product of a drug transaction." The government could never place a "widget" in context or connect it with anything, let alone a drug transaction.

"Financial transactions" include the movement of funds or other "monetary instruments." 18 U.S.C. §1956(c)(4). "Monetary instruments" include "coin or currency of the United States." 18 U.S.C. §1956(c)(5).

18 U.S.C. §1957 prohibits certain "monetary transactions" greater than $10,000. "Monetary transactions" include involvement of "a monetary instrument (as defined by section 1956(c)(5) of this title)." 18 U.S.C. §1957(f)(1).

> We hold that when the illegally seized *res* is a civil forfeiture proceeding consists of currency, courts may consider the fact that the illegally seized *res* is currency. This holding is consistent with *$191,910.00* that illegally seized property may not be "introduced as *evidence* in a forfeiture proceeding." App. 10-11.

Yet, in reality, by considering this information to prove an element of the involved criminal statute, the court approved of the *evidentiary* use of that information.

The only evidence that this *res* is currency was the direct and immediate result of the illegal search. The illegal search, and that illegality alone, allowed the government not only to seize this property, but to identify it in a manner required to support the forfeiture of it. Indeed, the district court's order of forfeiture was premised on its ability to identify the *res* as currency.

The Opinion, in essence, holds that it is necessary to consider the nature of the *res* for the government could never prove that a "featureless widget" is part of drug activity. Yet the government's *need* for this information is simply another way to say that the government *needs to exploit* illegally obtained information in order to make its case. And government exploitation of its own illegal conduct is exactly why the exclusionary rule exists.

While it is true that the *res* is not immunized from forfeiture due to its illegal seizure, it is still not admissible evidence in the case. Its continued existence in the lawsuit is necessary only as proof of the court's *in rem* jurisdiction over it.

The better view, of course, is that in *some* cases suppression does render the Government unable to prove forfeiture. But such failure is the result of lack of untainted proof as opposed to *immunization* of the *res*.

For example, in *United States v. Crews*, 445 U.S. 463 (1980), the defendant in a criminal prosecution was illegally arrested. Photographs and a lineup followed the arrest and as a result the defendant was identified by various witnesses. The trial court suppressed the lineup and the photo ID but allowed the witnesses to testify in court based on their independent recollection. 445 U.S. at 468. The court of appeals reversed, holding that but for the illegal arrest the police could not have used the tainted photo to find the witness, and therefore, the prosecution itself was the result of the bad arrest. 445 U.S. at 469.

United States v. Crews, citing the same authority as *INS v. Lopez-Mendoza* on this point, reversed and held that the defendant:

> [C]annot claim immunity from prosecution simply because his appearance in court was precipitated by an unlawful arrest. An illegal arrest, without more, has never been viewed as a bar to prosecution. . . . 445 U.S. at 474.

Interestingly, the Court also noted that:

> [I]n some cases, of course, prosecution may effectively be foreclosed by the absence of the challenged evidence. But this contemplated consequence is the product of the exclusion of specific evidence tainted by the Fourth Amendment violation and is not the result of a complete bar to prosecution. 445 U.S. at 474, n.20.

United States v. Crews teaches us that simply because the suppression of evidence *may* be fatal to a prosecution or forfeiture, that does not mean that the illegal search *immunized* the person or property from the process. Yet the holding of the Opinion at issue used the "immunity ban rule" as *the reason for* the admission of evidence of the character of the *res*. In essence, the Opinion states that if the court did not consider the nature of the *res,* then the forfeiture action could not proceed, and that result, so goes this reasoning, would offend the rule banning immunity. App. 11.

The odd result is that the Opinion interprets the "immunity ban rule" as a roadblock to the exclusionary rule rather than a simple rule of jurisdiction regardless of the exclusionary rule.

The exclusionary rule applies primarily to deter constitutional violations. *Sanchez-Llamas v. Oregon,* 548 U.S. 331, 348 (2006). Yet, given that exclusion of evidence can carry with it substantial social costs, the application of the rule must be weighed against the

value of deterrence in a given situation. *Hudson v. Michigan*, 547 U.S. 586, 596 (2006). To that end, "the value of deterrence depends on the strength of the incentive to commit the forbidden act." *Id.*

The strength of the incentive for law enforcement officers to seize cash, legally or otherwise, is self-evident. The holding in the Opinion at issue, that an illegally obtained characteristic can be used to prove forfeiture, would significantly *encourage* illegal seizures. The holding increases the already high incentive to find cash to forfeit.

Consider this hypothetical scenario. The police have an extensive list of drug suspects. The information upon which the police base these suspicions is too weak to justify either an arrest or a search. But armed with a copy of the Opinion at issue, the police illegally search everyone they can find. If they find any drugs or other contraband during that illegal search, that evidence would be suppressed in a criminal prosecution. But if the police seize currency instead, they can go forward with a forfeiture action despite the illegality.

Under this scenario the government could routinely exploit, to its own pecuniary benefit, systematic illegal searches and seizures. Proof of the first element, the unlawful act, could be provided by the independently developed suspicion. Indeed, once money is taken from the suspect further investigation of the original suspicion could be developed during the forfeiture process to bolster the initial suspicion.

Yet proof of the second element, that the *res* is currency, would rest solely on information from the illegal search.

The holding in the Opinion at issue approves such conduct. Given the police incentive to both enrich departmental coffers and to strip suspects, and probably even non-suspects, of money, such procedures would become commonplace – despite the constitutional violation involved.

While the exclusionary rule often involves some societal costs, there are also societal benefits beyond the deterrent effect. Justice Brennan noted that the exclusionary rule is designed to do more that just deter police misconduct. It removes the judiciary from the taint of partnership in police misconduct and it assures the populace that the "government would not profit from its lawless behavior." *United States v. Calandra*, 414 U.S. 338, 357 (1974) [Brennan, J., dissenting].

Allowing the Government to identify the nature of illegally seized property solely by reference to knowledge obtained from the illegal search itself and then use that knowledge to prove an element of forfeiture, seemingly runs afoul of any rationale for the exclusionary rule.

Finally, this Court has noted that it makes sense to scrutinize government actions more closely when the government has "direct pecuniary interest in the

outcome of the proceeding." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 56 (1993).

CONCLUSION

For either or both reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES of America,
Plaintiff-Appellee,

v.

$493,850.00 IN U.S. CURRENCY;
One 1993 Ford F-350 Truck,
Defendants.

Roy F. Bruno; Miguel Camacho,
Claimants-Appellants.

No. 06-15225.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Dec. 5, 2007.

Filed March 13, 2008.

Richard B. Jones, Tucson, AZ, for the claimants-appellants.

Paul K. Charlton, United States Attorney, District of Arizona and Joan G. Ruffennach and John Joseph Tuchi, Assistant United States Attorneys for the District of Arizona, Phoenix, AZ, for the plaintiff-appellee.

Appeal from the United States District Court for the District of Arizona; Virginia A. Mathis, Magistrate Judge, Presiding. D.C. No. CV-03-02345-VAM.

Before: JEROME FARRIS, ROBERT R. BEEZER, and SIDNEY R. THOMAS, Circuit Judges.

BEEZER, Circuit Judge:

Roy Bruno ("Bruno") and Miguel Camacho ("Camacho") (collectively, "Claimants") appeal the magistrate judge's order granting summary judgment in favor of the government in its civil forfeiture action against $493,850 in U.S. currency and one 1993 Ford F-350 truck. We affirm.

I

On June 3, 2003, Officer John McFarland ("McFarland") of the Arizona Highway Patrol observed a Ford truck with Florida license plates swerve over the center line on an Arizona highway. McFarland pulled the truck over and approached the driver. As he approached, McFarland could smell the strong odor of air freshener, which, in his experience, suspects often used to cover the odor of narcotics. He questioned the driver, Camacho, and the passenger, Bruno. McFarland noted some minor inconsistencies between their statements, but issued Camacho a warning and told him that he was free to leave.

As Camacho walked back towards the truck, McFarland called Camacho back and began talking to him about drug trafficking. McFarland asked for, but did not receive, consent to search the truck. McFarland also asked for, and eventually received, consent to run a drug-sniffing dog around the truck. The dog alerted. McFarland searched the truck and found $493,850 concealed throughout the truck. He seized the truck and the currency.

On November 26, 2003, the government brought a civil complaint for forfeiture, separately naming $493,850 in U.S. currency and one 1993 Ford F-350 truck as *in rem* defendants. The government alleged that the currency was subject to forfeiture because it was furnished or intended to be furnished in exchange for a controlled substance. Alternatively, it alleged that the currency was subject to forfeiture because it was engaged in a transaction or attempted transaction involving property derived from a specified unlawful activity. The government alleged that the truck was subject to forfeiture because it was used and intended to be used to transport and facilitate the transportation, sale, receipt, possession and concealment of a controlled substance.

Bruno timely filed a claim to the currency. Camacho timely filed a claim to the truck. All parties consented to proceed before a U.S. magistrate judge.

After an evidentiary hearing, the magistrate judge held that McFarland had made a lawful investigatory stop of the truck, but that he unlawfully exceeded the scope of the investigatory stop by calling Camacho back, questioning him and searching and seizing the truck and currency. The magistrate judge suppressed all evidence gathered after McFarland issued Camacho the warning.

The government subsequently presented the following facts in a motion for summary judgment, which the government had not previously disclosed to Claimants because of an ongoing and sealed criminal

investigation: (1) a special agent with the Drug Enforcement Administration ("DEA") learned of the June 3, 2003 seizure on the day it occurred; (2) on that same day, that same agent also learned that Camacho was the subject of an ongoing DEA investigation in Miami, Florida; (3) DEA agents had observed Camacho's 1993 Ford F-350 truck during that investigation; and (4) Camacho was the subject of a separate narcotics investigation being conducted by the South Florida Money Laundering Strike Force.

The government also submitted affidavits by two witnesses cooperating in the Miami investigations, which were both signed after the complaint was filed. The witnesses testified that long before the illegal search and seizure, Camacho met separately with each of them to discuss the importation and sale of cocaine. Camacho indicated to these witnesses that he employs his family members in his cocaine operations, and that he personally transports cocaine and currency to Mexico using different types of vehicles. One of the witnesses met Bruno, a relative by marriage, during one of these meetings.

Based upon this information, the magistrate judge granted summary judgment in favor of the government. The magistrate judge found that the affidavits of the cooperating witnesses, as well as portions of the DEA agent's affidavit, were not tainted by the illegal search and seizure. The magistrate judge held that the government carried its burden in proving, by a preponderance of the evidence, a substantial connection between the *in rem* defendants

and cocaine transactions. The magistrate judge further held that the Claimants had failed to prove, by a preponderance of the evidence, that they were innocent owners because they presented nothing to rebut the government's evidence. The magistrate judge also drew a negative inference from Claimants' refusal to answer requests for admission based on the Fifth Amendment.

Claimants timely appealed. They initially moved to stay execution of the entire judgment pending appeal, but later withdrew their request as to the truck. The magistrate judge granted the motion to stay. The judgment as to the truck has been executed.

II

We review, de novo, the denial of a motion to suppress, *United States v. Jensen,* 425 F.3d 698, 704 (9th Cir.2005), a determination of probable cause, *United States v. $30,060 in U.S. Currency,* 39 F.3d 1039, 1041 (9th Cir.1994), an interpretation of federal forfeiture law, *United States v. 25445 Via Dona Christa,* 138 F.3d 403, 407 (9th Cir.1998), *amended by,* 170 F.3d 1161 (9th Cir.1999), and an order granting summary judgment, *United States v. 5208 Los Franciscos Way,* 385 F.3d 1187, 1190 (9th Cir.2004).

III

The government argues that we lack jurisdiction over the truck. We agree.

In *Republic National Bank of Miami v. United States*, 506 U.S. 80, 113 S.Ct. 554, 121 L.Ed.2d 474 (1992), the Supreme Court held that once a court validly asserts jurisdiction in an *in rem* civil forfeiture proceeding, courts of appeals may continue to exercise jurisdiction even after the *res* is removed from the court. 506 U.S. at 88-89, 113 S.Ct. 554. There is one exception to this rule, "where the release of the property would render the judgment 'useless' because 'the thing could neither be delivered to the libellants, nor restored to the claimants.'" *Id.* at 85, 113 S.Ct. 554.

In this case, the judgment as to the truck has been executed, so the *res* can neither be delivered nor restored to Claimants. *Id.* Claimants never entered into an agreement with the government to substitute proceeds from the sale of the truck in place of the truck for purposes of appeal. *Cf. Ventura Packers, Inc. v. F/V JEANINE KATHLEEN*, 424 F.3d 852, 861-62 (9th Cir.2005) (allowing substitution of property to abide the fate of the suit). A judgment as to the truck in this case would be useless. We lack jurisdiction over the truck.

IV

Claimants argue that the magistrate judge should have excluded all information from the Miami investigations as fruit of the poisonous tree, because Arizona investigators would not have learned of the information but for the illegal seizure. We disagree.

The exclusionary rule applies in civil forfeiture cases. *United States v. $191,910 in U.S. Currency,* 16 F.3d 1051, 1063 (9th Cir.1994), *superseded on other grounds as stated in United States v. $80,180 in U.S. Currency,* 303 F.3d 1182, 1184 (9th Cir.2002). It bars the admission of evidence obtained in violation of the U.S. Constitution, as well as "fruits of the poisonous tree." *United States v. Ramirez-Sandoval,* 872 F.2d 1392, 1395 (9th Cir.1989). "[U]nder the 'fruits of the poisonous tree' doctrine, evidence obtained subsequent to a violation of the Fourth Amendment is tainted by the illegality and is inadmissible. . . .'" *United States v. Washington,* 490 F.3d 765, 774 (9th Cir.2007). There are three exceptions to the fruits of the poisonous tree doctrine. *Ramirez-Sandoval,* 872 F.2d at 1396.

The independent source exception is at issue in this case. It allows admission of "evidence that is actually found by legal means through sources unrelated to the search." *Id.* "Independent source evidence is not 'fruit of the poisonous tree' because its discovery through independent legal means does not result from the official's illegal conduct." *Id.*

The information at issue here is not a fruit of the poisonous tree because it was not discovered subsequent to the illegal seizure, *see Washington,* 490 F.3d at 774, nor was it derived in any way from the illegal seizure, *see Ramirez-Sandoval,* 872 F.2d at 1396. The information was learned from preexisting, unrelated investigations. *See id.* It could have been, and likely was, discovered with the simple use of Camacho's

name and vehicle registration, which McFarland legally obtained before the illegal search and seizure. The Miami information is admissible.

V

Claimants argue that the magistrate judge erred in considering the fact that the illegally seized *res* consisted of $493,850 of U.S. currency. It is unclear whether the magistrate judge considered the amount of currency in her analysis. To the extent she considered the amount of currency, we agree that such consideration was improper. To the extent she merely recognized the nature of the illegally seized property as currency, we hold that such consideration was proper.

Illegally seized property may not be "introduced as *evidence* in a forfeiture proceeding." *$191,910,* 16 F.3d at 1063 (emphasis in original). For example, in *United States v. $191,910 in U.S. Currency,* police became suspicious of the claimant after he put his bags through an airport security x-ray that revealed he was carrying a large amount of cash. *Id.* at 1054. The claimant initially told police that he was a gemologist carrying $20,000, but later told police that he was carrying $15,000. *Id.* at 1054-55. Police, believing that they had reasonable suspicion to search the claimant's bags, discovered $191,910 in the bags. *Id.* at 1055-56. The government filed a forfeiture complaint against the $191,910. *Id.* The district court held that the search was illegal, suppressed all fruits

of the search and granted the claimant's motion for summary judgment. *Id.* at 1056-57.

We affirmed. *Id.* at 1054. We held that the district court properly suppressed the amount of money as fruit of the unlawful search. *Id.* at 1059, 1065. We rejected the government's arguments that (1) the money could not be suppressed because it was the nominal defendant, *id.* at 1062-63, and (2) the exclusionary rule bars only the introduction of illegally seized materials that are not the *res, id.* at 1063 n. 24. To have held otherwise would merely reward the government for carrying out an illegal search or seizure. *Id.* at 1065. Left only with evidence that (1) the claimant admitted to carrying either $15,000 or $20,000, (2) the claimant provided slightly inconsistent stories and (3) x-ray screening of the claimant's bags revealed that the claimant was carrying a large amount of cash, we held that the government had failed to establish, at the time it filed the complaint, probable cause to believe the money was intended for use in a drug transaction. *Id.* at 1071.

$191,910 makes clear that we cannot consider the amount of currency that the government illegally seized. *Id.* at 1059, 1065. The issue presented here is whether it necessarily follows that we are prohibited from considering the fact that the illegally seized

property is, in fact, currency.[1] This is an issue of first impression in this Circuit.[2]

Claimants argue that we cannot consider the fact that the illegally seized *res* consists of currency, and must instead treat the illegally seized *res* as a "featureless widget." Claimants attempt to distinguish *$191,910,* because in that case we referred to the illegally seized property as "money," but we had the benefit of an admission by the claimant that he was carrying "money." *See $191,910,* 16 F.3d at 1071-72.

Claimants read *$191,910* too broadly to exclude more than it does. We have consistently held that "'[t]he mere fact of the illegal seizure, standing alone, does not immunize the goods from forfeiture.'" *United States v. One 1977 Mercedes Benz,* 708 F.2d 444, 450

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[1] We note that circuit courts are split on the issue whether and to what extent illegally seized property must be suppressed when it is the object of a forfeiture action. David B. Smith, *Prosecution and Def. of Forfeiture Cases* § 10.05[8] (2007) (noting that this issue may be dispositive when illegally seized *res* is currency); *see also United States v. $557,933.89 in U.S. Currency,* 287 F.3d 66, 80 (2d Cir.2002) (undecided); *United States v. $36,634 in U.S. Currency,* 103 F.3d 1048, 1052 n. 3 (1st Cir.1997), *superseded on other grounds as stated in United States v. Lopez-Burgos,* 435 F.3d 1, 2 (1st Cir.2006) (limited admissibility); *United States v. $12,390 in U.S. Currency,* 956 F.2d 801, 806 (8th Cir.1992) (admissible); *United States v. $639,558 in U.S. Currency,* 955 F.2d 712, 715 n. 5 (D.C.Cir.1992) (limited admissibility).

[2] *But see $36,634,* 103 F.3d at 1052 n. 3 (recognizing illegally seized *res* as currency but excluding its amount in the First Circuit).

(9th Cir.1983). An interpretation of *$191,910* requiring us to ignore the character of the illegally seized property as currency, or requiring us to consider the illegally seized property a "featureless widget," would contradict this longstanding principle by immunizing illegally seized currency from forfeiture. As noted by the magistrate judge, there would be "no way for the government to show that a 'widget' is the product of a drug transaction." The government could never place a "widget" in context or connect it with anything, let alone a drug transaction.

We hold that when the illegally seized *res* in a civil forfeiture proceeding consists of currency, courts may consider the fact that the illegally seized *res* is currency. This holding is consistent with our holding in *$191,910* that illegally seized property may not be "introduced as *evidence* in a forfeiture proceeding." *See id.* at 1063. While courts may not introduce illegally seized currency into evidence or consider its amount, courts may recognize that illegally seized property consists of currency, if that is the case. Our view is consistent with the views of the First and D.C. Circuits. *See $36,634,* 103 F.3d at 1052 n. 3; *$639,558,* 955 F.2d at 715 n. 5.

VI

Claimants argue that the admissible evidence is insufficient to establish that the government had probable cause to institute the forfeiture action as required by 19 U.S.C. section 1615. The government

responds by arguing that the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA") eliminated section 1615's requirement that the government show probable cause to institute the forfeiture action. We agree with Claimants that section 1615's probable cause requirement survives CAFRA, but hold that the admissible evidence is sufficient to establish that the government had probable cause to institute the forfeiture action in this case.

A

It is an open question whether section 1615 continues to require that the government show that it had probable cause to institute a forfeiture suit. *See* Smith, *supra,* § 11.03[6]. Before CAFRA, section 1615 required that: (1) the government show that probable cause existed to institute a forfeiture action and (2) the claimant prove, by a preponderance of the evidence, that the property was not subject to forfeiture. *5208 Los Franciscos Way,* 385 F.3d at 1193. By placing the burden of proof on the claimant, section 1615 allowed the government to seize property based on nothing more than its initial showing of probable cause in many cases. 146 Cong. Rec. H2040-01, 2051 (daily ed. Apr. 11, 2000) (statement of Rep. Jackson-Lee). Motivated by a concern that this denied citizens due process, Congress passed CAFRA in 2000. *Id.* CAFRA sets forth the burden shifting analysis for civil forfeiture actions commenced on or after August 23, 2000. 18 U.S.C. § 983.

Although Congress never mentioned the effect of CAFRA on section 1615, *see* H.R.Rep. No. 105-358, pt. 1, at 41-42 (1997) (noting only that CAFRA codifies some existing procedures but replaces others to the extent they are inconsistent); 146 Cong. Rec. H2040-01, CAFRA supersedes certain portions of section 1615 with respect to forfeiture actions brought under 18 U.S.C. section 983:(1) it removes the burden of proof at trial from the claimant and places it on the government and (2) it raises the government's burden of proof at trial from probable cause to institute the action to proof, by a preponderance of the evidence, that the property is subject to forfeiture. *5208 Los Franciscos Way,* 385 F.3d at 1193. The issue here is whether CAFRA also replaced section 1615's probable cause requirement, or merely added to it.

When we interpret a statute, our purpose is to discern the intent of Congress. *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs.,* 448 F.3d 1092, 1093(9th Cir.2006). To discern the intent of Congress, "'[w]e look first to the plain language of the statute, construing the provisions of the entire law, including its object and policy.'" *Carson Harbor Vill., Ltd. v. Unocal Corp.,* 270 F.3d 863, 877 (9th Cir.2001) (internal citations omitted). We will resort to legislative history when that history "'clearly indicates that Congress meant something other than what it said.'" *Id.* (internal citations omitted). It is "'a cardinal principle of statutory construction that repeals by implication are not favored.'" *City & County of S.F. v. Assessment App. Bd.,* 122 F.3d 1274, 1276 (9th

Cir.1997) (internal citation omitted). "'An implied repeal may only be found if there is an irreconcilable conflict between the two federal statutes at issue.'" *Id.* (internal citation omitted).

The government argues that CAFRA's plain language eliminates the probable cause requirement by providing that "[n]o civil forfeiture complaint may be dismissed because the government lacked sufficient evidence at the time of filing." The government's citation to CAFRA is incomplete and misleading. CAFRA provides that "[n]o complaint may be dismissed on the ground that the Government did not have *adequate evidence at the time the complaint was filed to establish the forfeitability of the property.*" 18 U.S.C. § 983(a)(3)(D) (emphasis added). Post-CAFRA, establishing the forfeitability of property is distinct from having probable cause to institute the forfeiture action. *See* Smith, *supra,* § 11.03[6] (arguing that if Congress meant to eliminate the probable cause requirement, it would have stated, "[n]o complaint may be dismissed on the ground that the government did not have *probable cause at the time the complaint was filed*"). The former requirement describes the government's burden at trial to prove entitlement to the property by presenting proof, by a preponderance of the evidence, of a substantial connection between the property and the offense. 18 U.S.C. § 983(c). The latter requirement describes the government's burden to get in the courthouse door by presenting evidence that, at the time it filed the complaint, it had "'reasonable grounds to believe that the property was

related to an illegal drug transaction, supported by less than prima facie proof but more than mere suspicion.'" *United States v. One Parcel of Real Prop.*, 904 F.2d 487, 490-91 (9th Cir.1990).

CAFRA's provision allowing the government to use evidence gathered after the filing of a complaint to establish the forfeitability of the property, 18 U.S.C. § 983(c)(2), similarly does not conflict with our holding in *$191,910* that the government may not use after-acquired evidence to establish probable cause to institute a forfeiture action, *see $191,910,* 16 F.3d at 1071. The CAFRA requirement refers to the use of after-acquired evidence in satisfying the government's burden of proof at trial to prove entitlement to the property. 18 U.S.C. § 983(c)(2). Such evidence will include evidence gathered at all stages of litigation. The requirement in *$191,910* refers to the use of after-acquired evidence in satisfying the government's lesser burden needed to get in the courthouse door. *$191,910,* 16 F.3d at 1071. Such evidence will include only evidence gathered up until the complaint was filed.

The government cites the First Circuit's opinion in *United States v. Lopez-Burgos,* 435 F.3d 1 (1st Cir.2006), for the proposition that CAFRA eliminated section 1615's probable cause requirement. In *Lopez-Burgos,* the First Circuit held that CAFRA eliminated the government's need to plead facts sufficient to

establish probable cause to forfeit.[3] 435 F.3d at 2. At no point in its brief opinion did the First Circuit analyze whether CAFRA eliminated section 1615's requirement that the government show probable cause to institute a forfeiture action.[4] *Id.* In fact, the First Circuit was specific in noting that CAFRA increased the government's "burden of proof at trial," *id.*, rather than replaced its initial burden in filing the complaint. Although *Lopez-Burgos* described section 1615 as "statutorily superseded," "legally irrelevant" and "since repealed," *id.*, this description is inaccurate because section 1615 remains applicable to forfeiture actions brought under Titles 19 and 26, *see* 18 U.S.C. § 983(i), if not to all forfeiture actions because of the probable cause requirement.

Claimants argue that CAFRA's legislative history clearly indicates that the government is still required to show probable cause to institute a forfeiture action. CAFRA's legislative history indicates that CAFRA was intended to modify or codify certain practices, but it is devoid of any reference as to whether CAFRA eliminated the probable cause requirement. *See, e.g.*, H.R.Rep. No. 105-358, pt. 1. U.S. Representative

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[3] The Fourth Circuit issued a similar opinion and also limited its discussion of CAFRA to pleading requirements and the government's burden of proof at trial. *See United States v. Mondragon*, 313 F.3d 862, 865 (4th Cir.2002).

[4] *But see* Smith, *supra*, § 11.03[6] n. 56.4 (faulting First Circuit because it "appears to have accepted the government's bogus argument" that CAFRA abolishes the probable cause requirement).

Henry Hyde stated that "current law would be retained allowing the government to forfeit property on a showing of probable cause if the property owner elects not to challenge the forfeiture by filing a claim." *Id.* at 28. He also stated that:

> [W]hile the government may use evidence obtained after the forfeiture complaint is filed to establish the forfeitability of the property by a preponderance of the evidence, the government must still have had enough evidence to establish probable cause at the time of filing (or seizure, if earlier).

146 Cong. Rec. H2040-01, 2050 (statement of Rep. Hyde).

These statements are not the clear support Claimants argue them to be because they could refer to either (1) the government's burden to show probable cause to seize the property under 18 U.S.C. section 981 or (2) the government's burden to show probable cause to file its forfeiture action under 19 U.S.C. section 1615.

Nevertheless, the coexistence of section 1615's probable cause requirement and CAFRA is consistent with the legislative intent of CAFRA. In enacting CAFRA, Congress intended to institute stronger procedural safeguards before the government could forfeit property. *See, e.g.*,146 Cong. Rec. H2040-01, 2051 (statement of Rep. Jackson-Lee); *id.* at 2052 (statement of Rep. Barr). Requiring the government to show probable cause before instituting a forfeiture

action is consistent with this intent because it provides an additional procedural protection. *See $191,910,* 16 F.3d at 1069.

Nothing in CAFRA's plain language indicates that Congress intended to eliminate section 1615's probable cause requirement, there is no irreconcilable conflict between section 1615 and CAFRA, CAFRA's legislative history is devoid of any relevant discussion on the issue and repeals by implication are disfavored. It is also well-established that "forfeiture statutes are strictly construed against the government." *$191,910,* 16 F.3d at 1068. We hold that section 1615 continues to require that the government show probable cause to institute a forfeiture action.

B

The government has probable cause to institute a forfeiture action when it has "'reasonable grounds to believe that the property was related to an illegal drug transaction, supported by less than prima facie proof but more than mere suspicion.'" *One Parcel of Real Prop.,* 904 F.2d at 490-91. "Probable cause to believe that the property is involved in *some* illegal activity is not enough – the government must have probable cause to believe that the property is involved in the activity subject to the specific forfeiture statute it invokes." *$191,910,* 16 F.3d at 1071. Probable cause may only be based upon information gathered before the complaint was filed. *Id.*

Prior to November 26, 2003, when the government filed the civil forfeiture complaint, McFarland legally gathered evidence that: (1) Camacho was driving a 1993 Ford F-350 truck with Florida license plates in Arizona; (2) Camacho and Bruno provided slightly inconsistent stories; (3) the truck smelled strongly of air freshener; and (4) in McFarland's experience, suspects often used strong air freshener to cover the smell of narcotics. Prior to November 26, 2003, the government also legally gathered evidence that: (1) Camacho was the subject of an ongoing DEA investigation in Miami and (2) DEA agents had observed the truck at issue during that investigation.

McFarland's evidence, standing alone, may only raise a mere suspicion that Claimants are involved in narcotics activity. When that evidence is combined with the Miami evidence linking Camacho and his truck with cocaine traffickers, however, it is sufficient to satisfy probable cause. The evidence provides reasonable grounds to believe that Camacho, his truck and anything that could be used in furtherance of cocaine transactions-including cocaine, currency, transportation for both and persons assisting in the transportation of both – are related to or involved in illegal cocaine transactions. The government satisfied its burden under section 1615 with respect to the currency.

VII

Claimants argue that the magistrate judge erred granting summary judgment in favor of the government. We disagree.

In a civil forfeiture proceeding, CAFRA requires the government to prove, by a preponderance of the evidence, that property is subject to forfeiture. 18 U.S.C. § 983(c); *5208 Los Franciscos Way,* 385 F.3d at 1193. "[T]he government may use evidence gathered after the filing of a complaint for forfeiture to establish, by a preponderance of the evidence, that property is subject to forfeiture." 18 U.S.C. § 983(c)(2). Once the government provides such proof, the burden shifts to the claimant to prove that he or she is an innocent owner of the property. 18 U.S.C. § 983(d).

In this case, to meet its burden, the government may rely upon the evidence supporting probable cause, as well as the following evidence: (1) the fact that Camacho was observed during a second narcotics investigation and (2) affidavits from cooperating witnesses revealing that (a) Camacho had met with them several times to discuss the importation and sale of cocaine; (b) Camacho employed his family in his cocaine business; (c) Bruno was part of Camacho's family and had met one of the cocaine dealers; and (d) Camacho would personally transport cocaine and currency to Mexico.

This evidence is sufficient to prove, more likely than not, that Camacho, Bruno and anything that

could be used in furtherance of cocaine transactions-including cocaine, currency, transportation for both and persons assisting in the transportation of both-are involved in cocaine transactions. This is true regardless of the amount of currency at issue, because the evidence connecting Camacho and Bruno with cocaine trafficking is overwhelming.

Because the government met its burden under section 983, the burden shifted to Claimants to prove innocent ownership. In other words, it became Claimants' burden to prove, by a preponderance of the evidence, that Claimants: (1) did not know of the conduct giving rise to forfeiture; or (2) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property. 18 U.S.C. § 983(d)(2)(A). Claimants provided no evidence or argument regarding innocent ownership.[5] Claimants provided no evidence regarding an alternate theory of origin for the currency. Summary judgment was proper.

VIII

In granting summary judgment, the magistrate judge properly considered information from the

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[5] The Court does not reach the issue whether the magistrate judge erred in drawing a negative inference from Claimants' refusal to answer the requests for admission based on Fifth Amendment privilege.

Miami investigations and the nature of the *res* as currency. To the extent the magistrate judge relied upon the amount of currency, such reliance was error but only harmless error. The admissible evidence is sufficient to establish probable cause and proof, by a preponderance of the evidence, that the currency is subject to forfeiture without regard to the amount of currency. Claimants presented no evidence of innocent ownership. The magistrate judge properly granted summary judgment in favor of the government.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America, Plaintiff, v. $493,850.00 in U.S. Currency and One 1993 Ford F350 Truck, Defendants, Roy Bruno and Miguel Camacho, Claimants.	CIV 03-2345 PHX VAM ORDER

A. PROCEDURAL HISTORY

On November 26, 2003, plaintiff filed this forfeiture action. The Complaint alleges that the currency is subject to forfeiture because it represents money furnished or intended to be furnished by any person in exchange for a controlled substance. 21 U.S.C. § 881(a)(1)(A) and (B). (Doc. 1 at p. 1). The Complaint also alleges the currency is subject to forfeiture as it was involved in a transaction or attempted transaction in violation of 18 U.S.C. §§ 1956 or 1957. (*Id.*) The Complaint alleges the vehicle was used and intended to be used to transport and facilitate the transportation, sale, receipt, possession and concealment of a controlled substance in violation of 21 U.S.C. § 801, et seq. (*Id.* at p. 2.) Claimants Bruno and Camacho filed a Judicial Claim on December 22,

2003. Claimant Bruno alleges he is the owner and possessor of the currency and claimant Camacho the owner and possessor of the vehicle. (Doc. 4). Claimants also filed an Answer on that same date. (Doc. 5). The parties consented to proceed before a Magistrate Judge to trial and judgment. (Doc. 6). On April 27, 2004, a new claim was filed. The only difference between the new claim and the old claim is that the new claim is signed by the claimants themselves rather than their attorney. (Doc. 23).

On September 2, 2004, the Court granted a Motion to Suppress filed by claimants. (Doc. 27). In the Order, the Court suppressed " . . . the evidence gained after Officer McFarland determined there was no impairment of the driver, handed him a warning and told him he was free to go . . . " (*Id.* at pp. 13-14).

In the Order granting the Motion to Suppress, the Court denied Cross Motions for Summary Judgment. (Doc. 27). In its Motion for Summary Judgment, plaintiff challenged claimants' standing. The Court ruled, on the information available at that time, the claimants had standing.[1] (Doc. 27 at p. 16).

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[1] Claimants have the burden of proving standing at each stage of this proceeding. At summary judgment, claimants have the burden of showing there is a genuine issue of material fact. *United States v. $57,790.00,* 263 F.Supp.2d 1239, 1241-2 (S.D.Cal. 2003) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992). Claimant Bruno filed a claim under penalty of perjury stating the money is his. The admissions indicate the money is Camacho's.

The Court pointed out that the granting of the Motion to Suppress did not result in automatic summary judgment for claimants so long as the Government could prove the forfeiture through untainted evidence. *United States v. Real Property Known as 22249 Dolorosa Street,* 167 F.3d 509, 513 (9th Cir. 1999). (Doc. 27 at p. 16). In support of its summary judgment, plaintiff argued that claimants refusal to answer discovery requests, by claiming the Fifth Amendment privilege, automatically resulted in admissions which would support forfeiture. Plaintiff sent each of the claimants a series of requests for admissions. Rather than respond to the requests for admissions, claimants' attorney sent a letter indicating they would be invoking the Fifth Amendment to all discovery requests. Plaintiff took the position that Rule 36, F.R.Civ.P., automatically resulted in admissions. The Court pointed out that Rule 36(a), F.R.Civ.P., leaves it to the Court as to whether or not the answers or objections in response to requests for admissions are sufficient and, whether the matter should be deemed admitted or an amended answer be required. (Doc. 27 at p. 18). The Court denied the Cross Motions for Summary Judgment indicating it was unclear whether the Government had untainted evidence which would support forfeiture. (Doc. 27 at p. 19).

Shortly after this Order, claimants and plaintiff again filed Cross Motions for Summary Judgment. (Docs. 28-31). Claimants filed a Motion to Compel Disclosure. (Doc. 38). In response, the Government

filed a Motion to Stay the Proceedings pursuant to 18 U.S.C. § 981(g)(1) and 21 U.S.C. § 881(i). (Doc. 39). The Government also filed a Motion to Reargue the Suppression Issue based on a new Supreme Court ruling. (Doc. 43). All these Motions were set for oral argument. In the interim, the Court granted the Motion to Stay until further Order of the Court. (Doc. 47).

At the argument on the Motions for Summary Judgment, the Court denied the Cross Motions for Summary Judgment and denied without prejudice claimants' Motion to Compel Disclosure and Strike All Post-Deadline Information. (Doc. 50). The Court also denied plaintiff's Motion to Re-Argue the Suppression Issue. The Court entered a stay based on plaintiff's Motion to Stay. (Doc. 50). The Court then required the Government to file a status report or notice of disclosure by June 17, 2005. (*Id.*). The Government filed its status report, indicated that previous affidavits filed under seal could be disclosed and that recording of intercepted telephone calls and investigative reports would be provided to claimants in response to their discovery requests. (Doc. 52). Plaintiff also asked that the stay be removed so that discovery could be provided and the Court could consider appropriate motions by the parties. (*Id.*). On June 20, 2005, the Court granted the Motion to unseal, removed the stay and ordered the Government to provide discovery to claimants. The Court also indicated it would "entertain appropriate motions, based upon the release of discovery material

described in plaintiff's Motion." (Doc. 53). Plaintiff then responded to claimants' discovery demands. (Docs. 54, 56).

Plaintiff filed a Motion to Amend Plaintiff's Statement of Facts and Second Motion for Summary Judgment. (Doc. 59). Claimants have not opposed the Motion to Amend and it will be granted. Therefore, plaintiff's Motion for Summary Judgment (Doc. 57) will be considered with claimants' Opposition. (Doc. 61).

B. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when the movant shows "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), F.R.Civ.P.; *California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988). "Summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party bears the burden of demonstrating that there is no material fact precluding summary judgment. *Adickes v. S.H. Cress and Company*, 398 U.S. 144, 157 (1970).

Substantive law determines which facts are material. *Anderson v. Liberty Lobby*, 477 U.S. at 248; *Jesinger v. Nevada Federal Credit Union*, 24 F.3d

1127, 1130 (9th Cir. 1994). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson,* 477 U.S. at 248.

Summary judgment is appropriate against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corporation v. Catrett,* 477 U.S. 317, 322 (1986); *see also Citadel Holding Corporation v. Roven,* 26 F.2d 960, 964 (9th Cir. 1994).

Furthermore, the party opposing summary judgment "may not rest upon the mere allegations or denials of the [party's] pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." Rule 56(e), F.R.Civ.P.; *Celotex,* 477 U.S. at 324; *Matsushita Elec. Indus. Co. v. Zenith Radio,* 475 U.S. 574, 585-88 (1986); *Brinson v. Lind Rose Joint Venture,* 53 F.3d 1044, 1049 (9th Cir. 1995). There is no genuine issue for trial unless there is sufficient evidence favoring the non-moving party. If the evidence is merely colorable or if not significantly probative, summary judgment may be granted. *Anderson,* 477 U.S. at 249-50. However, "the evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in his favor." *Id.* at 255.

C. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff moved for summary judgment arguing that untainted evidence in the form of evidence obtained before the illegal search, evidence of a Miami investigation and claimants' claim of Fifth Amendment to requests for admissions (which plaintiff argues should be deemed admissions) support the forfeiture of both defendants. (Docs. 57, 58). Claimants oppose the Motion for Summary Judgment by arguing (1) the Motion for Summary Judgment is untimely and should not be considered, (2) the Miami information should be barred as a violation of the disclosure deadline under Rule 26, F.R.Civ.P., (3) the Miami information and the requests for admissions should be barred as exploitations of the illegal search, and (4) there is no untainted evidence to support the Government's Motion for Summary Judgment. (Docs. 60, 61). Claimants did not file an opposing statement of facts or affidavits under Rule 56(e), F.R.Civ.P. *See* LRCiv. 56.1(a).

1. Timeliness of the Motion for Summary Judgment

Claimants argue this Motion for Summary Judgment is untimely as it is well beyond the deadline for filing dispositive motions. Because of the problems of responding to claimants' discovery requests, in light of an ongoing criminal investigation in Miami, this case was stayed by the Court. When the Court lifted the stay, it indicated it would entertain appropriate

motions based on the evidence obtained and disclosed in discovery. (Doc. 53). It is not unusual for parallel civil and criminal proceedings to involve stays and disruption of the discovery process on both sides. As a result of the stay and ongoing proceedings in Miami, discovery was disclosed late but with the Court's approval. The Court can see no prejudice to the claimants as a result of the stay and the delay in the disclosure of the information from Miami. The Motion for Summary Judgment will be considered.

2. Use of the Miami Information

Claimants argue the Miami information should not be allowed as it is tainted by the illegal search. Claimants argue that but for the illegal search, the authorities in Arizona would never have obtained information from Miami regarding claimant Camacho.

In proceeding with this forfeiture, plaintiff may use evidence gathered after the filing of the Complaint to prove forfeiture. 18 U.S.C. § 983(c)(1)-(2). In addition, the granting of a motion to suppress does not end a forfeiture proceeding. The Government may proceed as long as it can prove the forfeiture through untainted evidence. *United States v. Real Property Known as 22249 Dolorosa Street,* 167 F.3d at 513. If claimants' argument were correct, the Government would never be able to use after-acquired evidence in a forfeiture where the Court suppressed evidence.

The Miami investigation began long before the authorities in Arizona obtained the truck and money

which are the subject of this forfeiture. The fact that the Miami investigation was proceeding completely independent of the Arizona forfeiture led to the need for the stay. (Doc. 40). If the Miami investigation had begun as a result of this illegal search, claimants' argument would have some force. However, it is clear from plaintiff's Statement of Facts and the information relied upon in that Statement of Facts, the actual occurrences which are relied upon by the United States to support its forfeiture occurred before the stop and illegal search. This information is clearly from an independent source and is completely attenuated. There is some information in the affidavit of Chris Jacobson (Doc. 58, Ex. H at par. 3) which was developed after the seizure. However, this information will be disregarded.

The Court finds the affidavits by cooperating individuals and paragraphs 1, 2, 4-7 of Agent Jacobsen's affidavit are untainted and may be considered in support of the Motion for Summary Judgment. (Doc. 58, Exs. G, H, and I). The information provided in affidavits of the cooperating individuals concerns events which occurred and are corroborated as occurring prior to the illegal search. The fact that this information is set forth in affidavits prepared after the illegal search does not mean that the information must be disregarded as tainted by an illegal search.

Claimants also argue that even if the Court considers the Miami information, it only raises genuine issues of material fact which preclude summary

judgment. However, claimants have failed to file anything to rebut the Statement of Facts and supporting affidavits.

3. Plaintiff's Reliance on the Requests for Admissions

Claimants argue the requests for admissions are also tainted by the illegal search and cannot be considered by the Court. In fact, claimants argue that based on the Court's earlier suppression ruling, nothing that occurred after the illegal search can be considered by the Court. Claimants do not cite any case in support of this proposition but simply argue but for the illegal search there would be no forfeiture. As pointed out earlier, a forfeiture may proceed after an illegal search and after-acquired evidence may be used to support a forfeiture. *United States v. $191,910 In U.S. Currency,* 16 F.3d 1051, 1062-63 (9th Cir. 1994); 18 U.S.C. § 983(c)(2). Given these two principles, claimants' argument must fail.

4. Plaintiff's Burden of Proof and Evidence

18 U.S.C. § 983(c) states:

> (c) Burden of proof. – In a suit or action brought under any civil forfeiture statute for the civil forfeiture of any property –
>
> (1) the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture;

> (2) the Government may use evidence gathered after the filing of a complaint for forfeiture to establish, by a preponderance of the evidence, that property is subject to forfeiture; and
>
> (3) if the Government's theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense, the Government shall establish that there was a substantial connection between the property and the offense.

If the Government is successful in establishing by a preponderance of evidence that the property is subject to forfeiture, then claimants must come forward and satisfy the requirement under 18 U.S.C. § 983(d), i.e. that they are innocent owners.

Plaintiff relies on three types of evidence to carry its burden of proving the defendants are subject to forfeiture. Plaintiff relies on evidence acquired prior to the illegal search, evidence of the Miami, Florida investigation and the requests for admissions sent by plaintiff to claimants and to which the claimants took the Fifth Amendment. Claimants argue plaintiff has not carried its burden of proving by a preponderance of evidence that the defendants are subject to forfeiture. Claimants argue there is no evidence before the Court. The Court has already ruled that evidence prior to the illegal search may be considered; the Miami information is not tainted by the illegal search

and evidence obtained by plaintiff during discovery is not tainted.

Claimants argue the Court may not even acknowledge that one of the defendants is money but rather must deal with the defendant money as if it were a "widget." (Doc. 60 at p. 14). Claimants' argument is based on *United States v. $191,910 In U.S. Currency,* 16 F.3d at 1062-1065. In this case, the Court held that once the Court grants a motion to suppress, " . . . illegally seized property could not be introduced as evidence in a forfeiture proceeding: Any evidence which is the product of an illegal search or seizure must be excluded in the forfeiture hearing . . . We must hold that the district court was correct in excluding the illegally seized money." (*Id.* at 1063). The Court's holding that the illegally seized money may not be entered in evidence during a forfeiture proceeding would obviously prevent plaintiff from bringing the cash, which is the subject of this forfeiture, into court and putting it in evidence.

However, the Court does not believe that exclusion of the cash means the Court must consider the defendant cash as a "widget." The Court believes it can still take notice of the fact that the defendant is cash. This is obviously stated in the caption of the case. Perhaps the denominations making up the amount and the actual money itself cannot be put into evidence. However, there is no way for the Government to show that a "widget" is the product of a drug transaction and, therefore, the Court does not believe it has to disregard the fact that one of the

defendants is cash. As to the truck, the Court knows from untainted evidence prior to the seizure that it is a white Ford truck, with dual rear wheels, with a Florida license plate, registered to claimant Miguel Camacho who resides in Florida. The Court also knows from untainted evidence that claimant Bruno was traveling south on I-17 outside of Phoenix with claimant Camacho in the Ford truck.[2]

The Court's task is to determine whether the untainted evidence shows, by a preponderance of the evidence, that the defendant currency is subject to forfeiture because it represents money furnished or intended to be furnished by any person in exchange for a controlled substance (21 U.S.C. § 881(a)(1)) or it is subject to forfeiture as it was involved in a transaction or attempted transaction in violation of 18 U.S.C. § 1956 or 1957. (Doc. 1 at p. 1). The Court must make a determination with regard to the truck as to whether it was used or intended to be used to transport and facilitate the transportation, sale, receipt, possession or concealment of a controlled substance in violation of 21 U.S.C. § 801, et seq. (Doc. 1 at p. 2).

The Miami evidence, in the form of affidavits from associates of claimant Camacho and a drug agent in Florida, is material, relevant and uncontradicted by claimants. A party opposing a motion for

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[2] As explained below, from the uncontested Statement of Facts in support of the Motion for Summary Judgment, the Court has additional information about the defendants.

summary judgment "may not rest upon the mere allegations or denials of the party's pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." Rule 56(e), F.R.Civ.P.; *Celotex,* 477 U.S. at 342; *Matsushita v. Zenith Radio,* 475 U.S. 574, 585-88 and *Brinson v. Lind Rose Joint Venture,* 53 F.3d at 1049. There is no issue for trial unless there is sufficient evidence favoring the non-moving party. Because claimants have not submitted any disputed facts in opposition to the Motion for Summary Judgment, the relevant and admissible evidence from Florida is unrebutted. A claimant cannot avoid his burden, in a forfeiture action, under Rule 56, F.R.Civ.P., by invoking the Fifth Amendment. *Baker v. United States,* 722 F.2d 517 (9th Cir. 1983); *United States v. Certain Real Property 566 Hendrickson Blvd.,* 986 F.2d 990, 995-6 (6th Cir. 1993).

The Miami evidence establishes that:

1. An individual known as Jairo Hernandez, during 2002 and 2003, worked for a Columbian cocaine dealer by the name of Roberto Guillo. Roberto Guillo wanted to sell cocaine to claimant Miguel Camacho in Miami, Florida. At Mr. Guillo's direction, Jairo Hernandez traveled to Miami, Florida and met with claimant Camacho in June, 2002. Mr. Hernandez was picked up at the airport by Mr. Camacho driving a white, dual rear wheeled pickup truck. Mr. Jairo Hernandez was taken to claimant Camacho's house where he saw cocaine and a hidden storage facility large enough to accommodate 1000 kilograms of cocaine. During this visit, claimant Camacho told

Mr. Hernandez he was in the business of selling cocaine and sold approximately 1000 kilograms of cocaine in the Miami area every 15-20 days. The two negotiated for the purchase of cocaine from Mr. Guillo but Mr. Camacho thought the price was too high. (Doc. 58 at Exs. G, H).

2. Mr. Jairo Hernandez met with claimant Camacho at his home in Miami, Florida again in May or July, 2003. At that time, claimant Camacho told Mr. Hernandez that his cocaine business was doing well and he was transporting cocaine from Mexico to Miami. While at claimant Camacho's house, Mr. Hernandez met claimant Bruno. Claimant Bruno was introduced to Mr. Hernandez as the husband of claimant Camacho's niece. Mr. Hernandez did not know the name of the husband of the niece. (Doc. 58 at Exs. G, H).

3. Leonardo Maya-Martinez, Sr. was introduced to claimant Camacho in approximately March, 2002 by cocaine dealer Alfredo Navarro. Claimant Camacho visited Mr. Maya-Martinez' home in Miami, Florida for the purpose of discussing the importation of cocaine from Columbia to the United States for sale. Mr. Maya-Martinez met with claimant Camacho three to five times. The last meeting was in approximately February or March of 2003. During these meetings, claimant Camacho told Mr. Maya-Martinez he is in the business of selling cocaine and his source is in Columbia. Claimant Camacho stated the cocaine was transported through Mexico and into the United States where it was sold in Florida and New York.

Although Mr. Maya-Martinez and claimant Camacho agreed on a price of $16,000.00 per kilogram for cocaine delivered to Miami, claimant Camacho never delivered any cocaine to Maya-Martinez. Claimant Camacho told Mr. Maya-Martinez he imports 2,000-3,000 kilograms of cocaine every three months and the cocaine is stored on a ranch near the United States/Mexico border. *Claimant Camacho told Mr. Maya-Martinez he utilizes several types of vehicles to transport his drugs and currency. Claimant Camacho told Mr. Maya-Martinez that he personally drives large amounts of cash to Mexico to make payments to the transportation organizations.*(Emphasis added). (Doc. 58 at Ex. I).

4. The Ford F-350 truck which is the subject of this forfeiture action was seen by drug agents while they were conducting surveillance in the Miami, Florida case. Both Jairo Hernandez and Leonardo Maya-Martinez, Sr. were charged, arrested and plead guilty to drug charges arising from the investigation in Miami, Florida. They provided the affidavits in this case as part of a cooperation agreement in Miami, Florida.

5. <u>The Requests for Admissions</u>

The requests for admissions sent to claimants Bruno and Camacho are set forth in plaintiff's Amended Statement of Facts at paragraphs 65-76. (Doc. 58 at pp. 11 and 12). Claimants decided to invoke their Fifth Amendment privilege and not

respond to these discovery requests. (Doc. 58 at Ex. B).

Plaintiff argues the requests for admissions may be considered in determining whether the Government has carried its burden of proof. The requests for admissions to claimant Camacho asked him to admit (1) he concealed or caused to be concealed the money in the Ford truck, (2) he altered the defendant Ford truck so drugs and cash could be concealed in one of the two fuel tanks, (3) the defendant Ford truck was used in drug trafficking, (4) the defendant money is his, (5) he knew the money was concealed in the defendant truck on June 3, 2003 and (6) he knew the money was to be used to acquire controlled substances.

The requests for admissions to claimant Bruno asked him to admit (1) he concealed or caused the money to be concealed in the defendant truck, (2) the money was to be used to purchase controlled substances or was the proceeds from the sale of controlled substances, (3) the money was acquired by claimant Camacho and (4) claimant Camacho acquired the funds from the "illegal exchange of controlled substances."

As pointed out above, both claimants asserted the Fifth Amendment to all discovery requests by plaintiff. A blanket assertion of the Fifth Amendment is no defense to a forfeiture. *United States v. Certain Real Property,* 986 F.2d at 996. Plaintiff now asks the Court to determine the sufficiency of claimants'

blanket invocation of the Fifth Amendment in response to the requests for admissions. Rule 36(a), F.R.Civ.P. The Court cannot conclude that invoking the Fifth Amendment as to all of the requests for admissions is proper. Clearly some of the requests could provide a link to proof of criminal activity but some of the requests are not facially incriminating. This is the problem with a claimant's blanket invocation of the Fifth Amendment. For example, claimant Bruno filed a claim to the money. However, he took the Fifth Amendment rather than deny the money was Camacho's. The Court finds the blanket invocation of the Fifth Amendment is an insufficient response under Rule 36, F.R.Civ.P., and the requests for admissions must be deemed admitted.[3]

Further, even if the Court were to find the blanket Fifth Amendment assertion proper under Rule 36, F.R.Civ.P., and the requests not deemed admitted, the Court may draw a negative inference from the invocation of the Fifth Amendment in this civil proceeding. *Baxter v. Palmigiano,* 425 U.S. 308, 318-20 (1976); *United States v. Rylander,* 460 U.S. 752, 758 (1983); *LiButti v. United States,* 107 F.3d 110, 121-125 (2nd Cir. 1997); *United States v. Stelmokas,* 100 F.3d 302, 310-311 (3rd Cir. 1996), *cert. denied,* 520 U.S.

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[3] In addition, by not submitting any evidence in opposition to plaintiff's Statement of Facts and the Court finding those statements supported by evidence, claimants have failed to raise a genuine issue of material fact as to those assertions found in claimants' Statement of Facts.

1242 (1999); *Brink's, Inc. v. City of New York,* 717 F.2d 700 (2nd Cir. 1983); *United States v. A Single Family Residence and Real Property Located at 900 Rio Vista Blvd.,* 803 F.2d 625, 629 at n.4 (11th Cir. 1986).

Some courts have held the negative inference cannot be the sole basis for ruling against the party invoking the privilege. *Butler v. Oak Creek-Franklin School District,* 172 F.Supp.2d 1102, 1126 (E.D.Wisc. 2001); *Kontos v. Kontos,* 968 F.Supp. 400, 408 (S.D.Ind. 997). Many courts have held the negative inference applies to those matters on which the party invoking the privilege has the burden of proof/production. *SEC v. Navin,* 97 F.3d 1460 (9th Cir. 1996) (unpublished opinion); *United States v. All Assets and Equipment of Westside Building Corp.,* 843 F.Supp. 377 (N.D.Ill. 1994); *United States v. One 1985 Plymouth Colt,* 644 F.Supp. 1546 (N.D.Ill. 1986).

In this forfeiture, plaintiff has produced untainted, uncontested evidence which proves by a preponderance of the evidence a substantial connection between the defendants and cocaine purchases and sales, i.e. that the defendant money is proceeds of cocaine sales and/or intended to be furnished to buy additional cocaine and that the defendant Ford truck was used and intended to be used to transport cocaine and money derived from cocaine sales. 21 U.S.C. § 881(a)(4) and (6). In short, plaintiff has carried its burden even without considering the requests for admissions. The Court comes to this conclusion based on the untainted evidence obtained prior to the illegal search and the information specifically referenced

above regarding the Miami investigation (i.e. affidavits of two drug dealers and portions of the affidavit of the drug agent).

Since plaintiff has fulfilled its burden of proof, claimants have the burden of producing evidence that they are "innocent owners." Claimants have not produced any evidence that they are "innocent owners." In addition, the negative inference which may be drawn from invoking the Fifth Amendment precludes such a finding. *Baxter v. Palmigiano,* 425 U.S. at 318-20; *United States v. Rylander,* 460 U.S. at 758; *United States v. A Single Family Residence,* 803 F.2d at 629 n.4; *United States v. Stelmokas,* 100 F.3d at 310-311; *LiButti v. United States,* 107 F.3d at 121-125; *United States v. All Assets and Equipment,* 843 F.Supp. at 377; *United States v. One 1985 Plymouth Colt,* 644 F.Supp. at 1546.

Because plaintiff has come forward with untainted and uncontested evidence to prove by a preponderance of the evidence that the defendants are subject to forfeiture and claimants have come forward with no evidence they are innocent owners, there is no genuine issue of material fact and plaintiff is entitled to judgment as a matter of law.

IT IS THEREFORE ORDERED granting plaintiff's uncontested Motion to Supplement or Amend Plaintiff's Statement of Facts and Second Motion for Summary Judgment. (Doc. 59).

IT IS FURTHER ORDERED granting plaintiff's Second Motion for Summary Judgment. (Doc.

57). The defendants are forfeited to the United States.

IT IS FURTHER ORDERED that the Clerk shall enter judgment for plaintiff.

DATED this 23rd day of January, 2006.

/s/ Virginia A. Mathis
Virginia A. Mathis
United States Magistrate Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, ROY F BRUNO; MIGUEL CAMACHO, Claimants-Appellants, v. $493,850.00 IN U.S. CURRENCY; ONE 1993 FORD F-350 TRUCK, Defendants.	No. 06-15225 D.C. No. CV-03-02345-VAM District of Arizona, Phoenix ORDER (Filed Jul. 3, 2008)

Before: FARRIS, BEEZER, and THOMAS, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judge Thomas votes to deny the petition for rehearing en banc and Judges Farris and Beezer so recommend.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.